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Twenty-ninth session

SUMMARY RECORD OF THE 592nd MEETING

Held at Headquarters, New York,
on Monday, 3 June 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

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96-80724 (E)

The meeting was called to order at 3.15 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 14 (continued)

1. Mr. MADRID (Spain) said that there was a lack of consistency between the third sentence of paragraph 113 of the proposed draft Guide to Enactment and article 14, paragraph 4, of the Draft Model Law. Under paragraph 4, the parties could, at their discretion, avoid the application of a given jurisdiction. In his country, there was a general rule that such procedural issues were established by law on the basis of objective facts, one such fact being the actual place where a contract was entered into or, as in the current case, the place where a data message was received or sent. While paragraph 4 established some presumptions regarding the place where the message was sent or received, the place of receipt was impossible to verify because the information was computerized. For procedural purposes then, it seemed reasonable, in public law, that a provision should also be made to prevent the parties from establishing, at their discretion, tax havens where they could habitually send and receive data messages without maintaining either a commercial or residential place of business there. Such a practice would run counter to the laws of virtually any country.

2. He therefore proposed the deletion from article 14, paragraph 4, of the words "unless otherwise agreed between the originator and the addressee of a computerized transmission of a data message", and the insertion in paragraph 5 of the word "procedural", between the words "administrative" and "criminal". To ensure that that paragraph was consistent with the others, he would support the general proposal of the Mexican delegation. Throughout the article, any reference to discretion between the originator and the addressee should be deleted.

3. Mr. BURMAN (United States of America) said that he could not agree with the proposal of the representative of Spain. It was critical to retain for commercial parties the ability to negotiate as between themselves a rule by which they would determine when their contractual actions would be deemed to have taken place, particularly since it was very difficult to apply normal conflict and contractual rules to events taking place through computerized messages which passed over many countries and might come from quite remote stations. Paragraph 4 was a default rule that sought to provide a standard only when the parties had not otherwise agreed. While his delegation would not object to having the drafting group consider the possibility of removing the phrase "unless otherwise agreed" from paragraph 4, such action should be consistent with article 10, paragraph 1. Should the effect of a drafting change be to remove the discretion of the parties to make such an agreement between themselves, then the change would constitute an unacceptable step backwards. The Commission did not need to - nor should it attempt to - rework the rules for public law purposes. For the same reason, addition of the word "procedural" would be a most unfortunate step. His delegation had already accepted, with

great difficulty, the word "administrative" because of its excessive reach in the context of commercial law rules or commercial transactions.

4. Mr. TELL (France) said that paragraph 4 did not provide for rules on the conflict of laws or for a rule of jurisdiction, so he did not see how the representative of Spain could infer that it provided for a rule allocating competence to a specific jurisdiction. In principle, where contracts were concerned, the applicable law was the law chosen by the parties. He was not in favour of adding the word "procedural" to paragraph 5 since conflict rules and jurisdiction rules differed from country to country.

5. Mr. MADRID (Spain) said he was not proposing that the abilities of the parties to come to an agreement should be eliminated or curtailed; that situation was covered by article 10. If other delegations had any objection to deleting the beginning of article 14, paragraph 4, he would not object to its retention. However, if exceptions were made for the broader issue of administrative norms, then exceptions should also be made for the narrower issue of procedural law. Parties could not by themselves determine anything which might run counter to administrative norms, yet the paragraph as currently drafted seemed to allow them to sidestep procedural norms which were part of public law.

6. Mr. SANDOVAL LÓPEZ (Chile) endorsed the statement by the representative of Spain.

7. Mr. BURMAN (United States of America) said it was highly unlikely that a party's choice of place for commercial and contractual purposes would cause a court to consider itself bound by that choice with regard to jurisdiction. The Commission was inviting a great deal of disregard of the model law by providing a long list of very broad exclusions in paragraph 5. For the United States, the word "procedural" covered a broad range of activities and events, but no United States judicial authorities had felt that it in any way implicated choice of jurisdiction. He hoped that the Commission would not begin to add to the already excessive list of exceptional terms in paragraph 5.

8. Mr. ALLEN (United Kingdom) said that if the representative of Spain was concerned principally about tax evasion, then paragraph 5 could state that paragraph 4 was subject to the provisions of administrative criminal data-protection or tax law instead of the present wording. Then it would be left to national law to decide, for example, whether for the purposes of tax law it would be possible to contract out of paragraph 4.

9. Mr. CHOUKRI (Observer for Morocco) said that he supported the United States proposal to delete paragraph 5 because that paragraph created more problems than it solved.

10. Mr. MADRID (Spain) said he would prefer that paragraph 5 should be deleted since, in any case, article 1 provided that States could specify those areas of law in which they did not wish the Model Law to be applicable.

11. Mr. SCHNEIDER (Germany) said that, having realized that the concept of administrative law did not necessarily include tax law, his delegation endorsed

the retention of paragraph 5 together with a proviso that would make it clear that the rule applied also to tax law.

12. Mr. TELL (France) said that he did not agree with the deletion of paragraph 5. As a compromise, the words "criminal or tax or data protection" could be added after the word "administrative".

13. Mr. ANDERSEN (Observer for Denmark) suggested that, instead of discussing the particular areas of law which should be included or excluded, the Commission should consider using language similar to that of article 5, paragraph 2, and article 6, paragraph 2.

14. Mr. UCHIDA (Japan) and Mr. ZHANG Yuqing (China) supported the United States proposal to delete paragraph 5.

15. Mr. LLOYD (Australia) said that he had understood the United States delegation as advocating the retention of article 14, paragraph 5, as it stood without the need for any further amendments, a position which his delegation endorsed. The word "administrative" was broad enough, and any lack of clarity could be taken care of in the Guide to Enactment.

16. Mr. BISCHOFF (Observer for Switzerland) supported the retention of paragraphs 4 and 5 in their current formulation.

17. Ms. BAZAROVA (Russian Federation), referring to paragraph 5, said that since administrative law was confined to a very narrow area of law in her country, specific mention should be made of tax law as well. She also wished to know what was meant by the term "data-protection law".

18. The CHAIRMAN suggested that the Commission should take up the Danish proposal and include a paragraph in article 15, paragraph 5, along the lines of article 5, paragraph 2, and article 6, paragraph 2.

19. Ms. REMSU (Observer for Canada), Mr. SCHNEIDER (Germany) and Ms. BAZAROVA (Russian Federation) supported the Chairman's suggestion.

20. Mr. MADRID (Spain) said that he, too, supported the proposal. However, the Spanish text of article 5, paragraph 2, article 6, paragraph 2, and article 13, paragraph 2, must be standardized, as in the English version.

21. Ms. BAZAROVA (Russian Federation) said that there was an inconsistency between paragraphs 3 and 4 of article 14. Paragraph 3 used the broad term "information system" while paragraph 4 referred to "computerized transmission" of a data message; the word "computerized" should be deleted.

22. Mr. ANDERSEN (Observer for Denmark) supported that proposal.

23. Mr. ALLEN (United Kingdom) said that the word "computerized" had been inserted in paragraph 4 because it had been felt that the difficulty which the paragraph sought to solve would occur only in computerized transmissions.

24. Mr. CHANDLER (United States of America) said that his delegation supported the Russian proposal; although the original reason for including the more restrictive terminology was valid, the distinction that was made could raise questions in the mind of the reader. The Commission must ensure the ease of application of the Model Law.

25. Mr. TELL (France) said that if the word "computerized" was deleted, paragraph 4 would be meaningless. An explanation of the paragraph was provided in the Guide to Enactment.

26. Mr. ANDERSEN (Observer for Denmark) said he supported the Russian proposal because of the problems which arose with the definition of a "data message". The distinction made in paragraph 4 was very difficult to maintain, and it would be better to avoid referring to particular types of technology.

27. Mr. DONG Yi (China) said that his delegation supported the Russian proposal. In article 2, the definition of "data message" covered, but was not limited to, electronic data interchange, electronic mail, telegram, telex and telecopy; if the reference in article 14, paragraph 4, was limited to "computerized transmission", loopholes would remain.

28. Mr. CHANDLER (United States of America) said that in the past the Commission had been careful to use the word "computerized" because of uncertainties as to the time of dispatch of faxes. However, the words "information system" took care of that problem. While distinction between telex, fax and electronic mail was sometimes blurred, they were all part of an information system, and proper control could be maintained.

29. Mr. LLOYD (Australia) said that the words "of a computerized transmission of a data message" should be deleted from paragraph 4.

30. Mr. CHANDLER (United States of America) supported that proposal.

31. Mr. LLOYD (Australia) said that article 14, paragraph 1, left open the possibility that there might be no dispatch date if an originator of a message had an agent send that message. He proposed that the words "or of the person who sends the data message on behalf of the originator" should be added.

32. Ms. REMSU (Canada), Mr. ALLEN (United Kingdom) and Mr. CHANDLER (United States of America) said that they supported the Australian proposal.

33. Mr. ANDERSEN (Observer for Denmark) said that his delegation also supported the proposal; although the term "originator" was defined in article 2, subparagraph (c), it was worth clarifying the meaning of article 14, paragraph 1.

34. Article 14, as orally amended, was adopted.

The meeting was suspended at 4.30 p.m. and resumed at 4.55 p.m.

Article 2

35. Mr. SORIEUL (International Trade Law Branch), introducing article 2, recalled that there were two issues to be resolved concerning subparagraph (a): firstly, whether it was appropriate to include telecopy as part of the definition of a data message; and secondly, whether a clear definition or an alternative term could be found for the word "analogous" in the second line of the English text.

36. Mr. ANDERSEN (Observer for Denmark) said that "analogous" could be a source of confusion because of its similarity to the term "analog".

37. Mr. MADRID (Spain) said that subparagraph (a) should perhaps be redrafted so that paper-based information was more clearly excluded; otherwise, there could be some confusion as to its scope. It was important to ensure that the Model Law did not affect well-established national practices in respect of rules concerning paper-based documentary evidence; the inclusion of the words "telegram, telex or telecopy" was likely to cause difficulties in that respect.

38. Mr. ANDERSEN (Observer for Denmark) suggested that the word "digital" should be added before the word "information" in the first line. It should be borne in mind that telegrams, telexes and telecopies, in digital form, could be processed by computers, and in such cases should fall within the scope of the Model Law.

39. Mr. CHANDLER (United States of America) noted that in the future, information would be transmitted in digital, analog or optical form. It would be unwise to limit the scope of the Model Law to digital information.

40. Mr. BAUM (Observer for the International Chamber of Commerce) agreed with the preceding speaker, adding that great restraint should be exercised in attempting to reinvent definitions. He, too, felt that the word "analogous" could cause confusion and suggested that it should be replaced by the word "similar".

41. Mr. PHUA (Singapore) said that his delegation did not support the proposal to add the word "digital" before the word "information", since it would preclude the application of the Model Law to analog information. Also, he agreed with the representative of Spain regarding the disadvantages of including more conventional means such as mail, telegram, telex or telecopy in the definition of "data message". That definition should be restricted to EDI, and the title of the Model Law should be reworded accordingly.

42. Mr. HOWLAND (United Kingdom) said that information generated, stored or communicated in analog form should not be excluded. He proposed that the words "in digital or analog form" should be added after the word "communicated", and that the word "analogous" should be deleted.

43. Mr. MADRID (Spain) said that to do so would preclude other forms of information which might be used in the future. To leave the Model Law open to future developments in information technology, the subparagraph should simply state: "(a) 'Data message' means information generated, stored or communicated

by electronic or similar means including, but not limited to, electronic data interchange (EDI)." That wording might still cover electronic mail, but it would avoid interfering with established national practices in respect of documentary evidence in the form of telegram, telex or telecopy.

44. Mr. ANDERSEN (Observer for Denmark) said it was not possible to have a Model Law that covered every present and future aspect of communications. He therefore proposed retaining the definition of data message as drafted, using the word "similar" to replace "analogous". The various views of the Commission regarding the definition of the term "data message" should be included in paragraphs 45 and 46 of the Guide to Enactment with a note explaining that the Model Law had been drafted taking into account existing technology, but that in the future, other communication technologies would also be covered. Definitions in the Model Law should be drafted in a way that allowed for some degree of interpretation, particularly by judges.

45. Mr. SORIEUL (International Trade Law Branch) said that EDI, as defined in article 2, subparagraph (b), referred to a narrow technique of transferring information between computers and did not cover all uses of electronic data, such as electronic mail. In future, communications would include EDI as well as other, less restrictive technologies, such as electronic mail and the Internet. Thus, it was of greater importance at present to lay down rules that applied to those technologies and not only to the relatively sophisticated EDI form of exchanges. If the current definition of EDI did not include electronic mail, the Model Law would be useless in the future.

46. Mr. CHANDLER (United States of America) agreed that an overly restrictive definition of EDI would destroy any usefulness of the Model Law. A definition of the term "data message" should include electronic mail, which was used to forward EDI messages, as well as such methods as "FDI", the fax transmission of information that was subsequently transferred into an EDI system. While EDI was central to the transfer of information, all the EDI-related communications attachments should also be covered under the Model Law if it was to be useful in the future.

47. Ms. GUREYEVA (Russian Federation) proposed replacing the phrase "electronic, optical or analogous means" in subparagraph (a), with the term "automated means" to broaden the definition of the term "data message".

48. Mr. ALLEN (United Kingdom) shared the views of previous speakers who favoured a broad and flexible definition of the term "data message". However, the definition should not be so nebulous that the term became incomprehensible. He proposed replacing the phrase "electronic, optical or analogous means" with "an information system", rather than "automated means", since EDI was not completely automated and involved human agency. In subparagraph (f), which defined the term "information system", the words "a system" should be replaced by the expression "information technology".

49. Mr. MASUD (Observer for Pakistan) said that the term "data message" emphasized both the information and the means of communication and thus the question of how the data message was generated or stored was not relevant. He

suggested that the terms "generated" and "stored" should be deleted from the definition in subparagraph (a).

50. Mr. MADRID (Spain), endorsing the comments of previous speakers, suggested that the Model Law should include a definition of "electronic mail" in article 2 in order to make the Model Law as broad, yet complete as possible. If the Model Law was too narrow, it would become useless; however, if incorrectly drafted or ambiguous, it would open itself to misuse.

51. Mr. SANDOVAL LÓPEZ (Chile) favoured retaining the definition of "data message" in article 2, subparagraph (a), as originally drafted, since that definition was not limited to EDI alone.

52. Mr. PHUA (Singapore) supported the United Kingdom proposal to replace the phrase "electronic, optical or analogous means" with "an information system" in subparagraph (a) and to amend subparagraph (f) to read "information system means information technology". He agreed that the final words of subparagraph (f), "in a data message", should be deleted to avoid circular reasoning. The United Kingdom proposal provided a definition for "data message" that would facilitate the use of technology without undoing all of the legal forms that dealt with traditional methods of communication.

53. Mr. LLOYD (Australia) rejected both the United Kingdom proposal, and the term "automated means" because neither took into account non-physical materials. He supported the proposal of the observer for Denmark and the suggestion to include a definition of "electronic mail" in article 2. He opposed the deletion of the words "generated" or "stored".

54. Mr. TELL (France) supported the suggestion by the observer for Denmark to retain the text as drafted, but favoured "analogous" as the more appropriate term.

55. Mr. SCHNEIDER (Germany) endorsed the Danish suggestion to retain the definition of "data message" as originally drafted in subparagraph (a) and rejected the United Kingdom proposal, which resulted in circular reasoning.

The meeting rose at 6 p.m.

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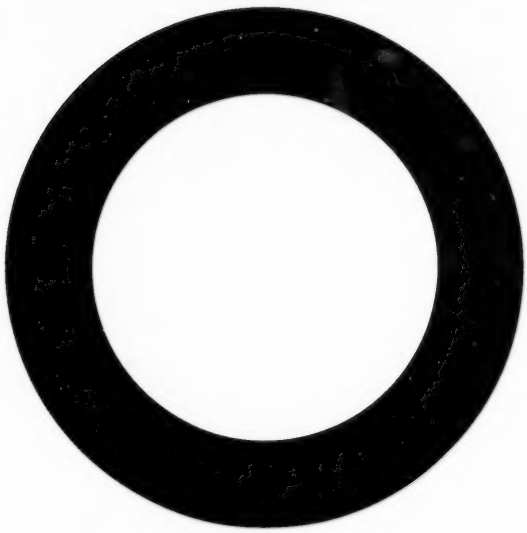

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Twenty-ninth session

SUMMARY RECORD OF THE 593rd MEETING

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on Tuesday, 4 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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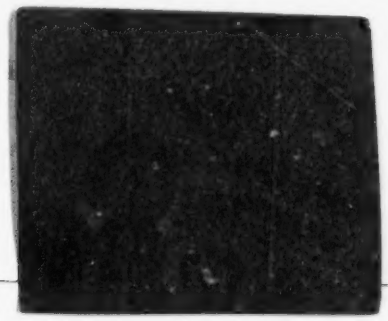

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96-80736 (E)

The meeting was called to order at 10.20 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/426)

Article 2 (continued)

1. Mr. BURMAN (United States of America), said his delegation too, would prefer to retain the wording of article 2, subparagraph (a), and to replace "analogous" by "similar". His delegation was greatly disturbed by efforts to introduce radical changes into a text which had already been painstakingly elaborated by the Working Group. Such redrafting could destroy the balance and consistency of the articles of the draft Model Law. He urged delegations to focus attention solely on a few remaining problems, with a view to finalizing the draft on time.

2. Ms. REMSU (Observer for Canada) said she supported the views expressed by the representatives of the United States, Australia and Germany and the observer for Denmark. Her delegation, too, felt that the wording of subparagraph (a) should remain unchanged. The word "analogous" should be replaced by "similar" and an explanation could be included in the draft Guide to Enactment of the Model Law (A/CN.9/426). As the Australian representative had pointed out, the words "generated and stored" should also be retained, in order to ensure that the article covered information that had been recorded and stored but not necessarily communicated.

3. Mr. BAUM (Observer for the International Chamber of Commerce) said he strongly supported both the remarks made by the secretariat at the previous meeting concerning the definitions and the appeal just issued by the United States representative. Members of the Commission should respect the intricate legal and technical work done by their predecessors and should not introduce radical changes.

4. Mr. MADRID (Spain) said he agreed with the United States representative on the need to finalize the draft speedily. Subparagraph (a) should make it clear that it covered only telegrams, telexes and telecopies transmitted by electronic means; that would avoid a paradoxical situation in which the Model Law applied when they were sent by other means. The Spanish version of the text contained the word "similar" and he had no objection to the term being used in English.

5. Mr. SORIEUL (International Trade Law Branch) said the issue was not one of drafting but rather of content and the scope of the Model Law. The Commission must identify common elements of electronic and optical systems in order to determine whether "similar" or "analogous" was more appropriate.

6. Mr. DONG Yi (China) said the word "analogous" could mean either "simi " or "analogous" in the sense of digital. Therefore, the word "similar" sh..ld be used for the sake of clarity.

7. Mr. ALLEN (United Kingdom) said he strongly supported the remarks made by the representative of the secretariat. If no common points were found between

optical and electronic means of transmission, the use of "similar" or "analogous" could be taken as including paper and other means, which would be disastrous. It might be preferable in that case to rely on a specific list which was as open to future developments as possible. He stressed that "digital analog", which had been widely supported at the previous meeting, referred to form and "electronic and optical" referred to means of transmission. The most effective wording would be "digital analog or light form", which left room for the inclusion of light technology in the future. Otherwise, the only solution was to delete "or analogous means" and simply say "by electronic and optical means". Indeed, the Working Group had never been completely satisfied with the use of "analogous" because the problem was one of logic, not merely drafting.

8. Ms. REMSU (Observer for Canada) said that if "similar" were eliminated, the result would be an unnecessarily restrictive list. One common feature of both electronic and optical means was that they were paperless. The term "paperless" might therefore be very apt, particularly since the Commission had already used it to describe the data message as a paperless exchange of information and a paperless recording.

9. Mr. LLOYD (Australia) noted that the formulations "electronic, optical" and "analogous" or "similar" were remarkably close to the wording of an article of the Australian Constitution on telegraphs and telephones which had never been misinterpreted in 96 years. He disagreed with the United Kingdom representative and the secretariat. Both article 2 and the entire draft Model Law were eminently clear. The use of "paperless" could be problematical, as telecopies and telexes were transmitted on paper.

10. Mr. ANDERSEN (Observer for Denmark) praised the Canadian suggestion, although his delegation still believed that the wording of subparagraph (a) should be left unchanged. Expressing support for the statement made by the United States representative, he suggested that proposals concerning issues should not be permitted to be discussed during Commission meetings unless they had been submitted beforehand in writing.

11. Mr. MADRID (Spain) said the word "electronic" should be retained. He expressed strong support for the Canadian suggestion to add the word "paperless" and also agreed with the remarks made by the Australian representative.

12. Mr. PHUA (Singapore) said that, in line with the remarks made by the United States representative, the carefully elaborated draft Model Law should not be changed. He agreed with the United Kingdom representative that the definition of "data message" had always been controversial in the Working Group and that its definition in the Model Law might have to be interpreted at a later stage. He also agreed with the secretariat's views on the use of "similar", for it was not clear what kind of technology embraced electronic, optical and analog digital means. If the draft Guide to Enactment could be expanded to specify that the data message was paperless, his delegation could accept the definition as it stood.

13. Mr. SCHNEIDER (Germany) said he agreed with the representative of Singapore. The word "similar" was not clear at all. With regard to the proposed use of the word "paperless" he noted that smoke signals and foghorns

were paperless but not necessarily electronic or optical. At the very least, definitions should include examples in order to help the reader. The text of subparagraph (a) should be left unchanged and the Guide to Enactment should be used for explanations.

14. Mr. CHOUKRI (Observer for Morocco) said subparagraph (a) could be left unchanged. The Arabic term for "analogous" presented no ambiguities. However, the reference to optical means of communication should be deleted from the text and included in the explanatory notes in the Guide to Enactment.

15. Mr. TELL (France) associated himself with the previous speakers who had favoured retaining the current text of subparagraph (a).

16. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for International Commercial Arbitration) said he, too, supported the retention of the subparagraph in its current form. The explanation of any ambiguities could be included in the Guide.

17. Mr. SORIEUL (International Trade Law Branch) said subparagraph (a) would be retained in its current form, and the explanation to be added to the Guide would concern the "paperless" aspect common to the various means of data interchange mentioned in the text.

18. The CHAIRMAN said there appeared to be a consensus that subparagraph (a) should be retained in its current form.

19. Mr. SORIEUL (International Trade Law Branch) said the text of subparagraph (b) had been drafted to resemble as closely as possible the definition of electronic data interchange (EDI) used by the Economic Commission for Europe, in that it referred specifically to communication between computers and the structured nature of the data being communicated. However, the question arose whether the manual transmission of electronic data as for example via diskette, fell within the definition of EDI.

20. Ms. BOSS (United States of America) said that such manual transfers of data could be included in the definition of EDI by changing the phrase "from computer to computer of" in subparagraph (b) to "of computer-based".

21. Mr. MASUD (Observer for Pakistan) suggested that the definition should include optical as well as electronic means of transferring information.

22. Mr. DONG Yi (China), supported by Mr. TELL (France), Mr. BAUM (Observer for the International Chamber of Commerce) and Mr. UCHIDA (Japan), said the Model Law's definition of EDI was consistent with those used by other international bodies such as the Economic and Social Council, and should be retained as currently formulated.

23. Mr. HOWLAND (United Kingdom) said he associated himself with previous speakers supporting the retention of subparagraph (b) as currently formulated. While structured electronic information could be transferred by physical means for subsequent processing by computer, the definition in subparagraph (a) was

broad enough to cover such transfers whether or not they fell within the strict definition of EDI.

24. Mr. SORIEUL (International Trade Law Branch) said the text of subparagraph (b) would be retained in its current form; the Guide would be amended to indicate that the definition of EDI included the manual exchange of electronic data on diskettes, provided the data was structured in a format agreed upon by the parties.

25. The CHAIRMAN said there appeared to be a consensus that subparagraph (b) should be retained in its current form.

26. Mr. HOWLAND (United Kingdom), supported by Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for International Commercial Arbitration), said that as currently formulated, the term "originator" in subparagraph (c) appeared to include both the sender of a data message and a recipient who stored it. He proposed that the words "prior to being" should be added to the text before "stored"; the words following "or communicated" would be deleted.

27. Mr. LLOYD (Australia), supported by Mr. BAUM (Observer for the International Chamber of Commerce), supported the United Kingdom proposal, with the further amendment that the words "stored or" should be removed entirely.

28. Mr. UCHIDA (Japan), supported by Mr. SCHNEIDER (Germany), Ms. BOSS (United States of America), Mr. FARIDI ARAGHI (Islamic Republic of Iran) and Mr. ANDERSEN (Observer for Denmark), said subparagraph (c) should be retained as currently formulated, except that the words "purports to have been" should be replaced by "has been". The corresponding note in the Guide would refer to the conditions of attribution contained in article 11 of the Model Law.

29. Ms. BOSS (United States of America) said the debate on article 2 had prompted her delegation to re-examine article 6, where the term "originator" appeared to be ambiguous; the problem could be solved by replacing "originator" by "signer" throughout article 6. Such a change would permit the deletion of the words "stored or" in article 2, subparagraph (c).

The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.

30. Mr. LLOYD (Australia) said it was essential to retain the words "purports to" in subparagraph (c) for the purposes of article 6 and article 11, paragraph 3 (b). In both of those articles there was a reliance on appearances rather than actuality. With respect to article 11 in particular, where a message was sent by an impersonator the proposed deletion would make the impersonator, in effect, the originator. It was thus important to define the originator as the person on whose behalf a data message purported to have been generated.

31. Mr. ALLEN (United Kingdom) agreed that it was essential to retain "purports to" in subparagraph (c) for the purposes of articles 6 and 11.

32. Mr. ANDERSEN (Observer for Denmark) said that in view of the amendments to article 11 proposed earlier in the session, subparagraph (c) would still be clear with the deletion proposed by the delegation of Japan.

33. Mr. PHUA (Singapore) said he agreed with the representatives of Australia and the United Kingdom that the words "purports to" should be retained in subparagraph (c). If an impersonator obtained the digital signature of an originator and a data message was then verified by an addressee using an agreed method, the impersonator would, as noted by the representative of Australia, in fact become the originator.

34. Mr. MADRID (Spain) said the word "presuntamente", which would convey the idea expressed in the English text by the word "purported", did not appear in the Spanish text, but his delegation would prefer to retain the current Spanish wording. The point at issue might be resolved by including in the Guide comments making it clear that the originator was to be defined in terms of a message having first been generated, then stored or communicated. That would avoid the possibility of a recipient who stored a message being categorized as an originator.

35. The CHAIRMAN said there appeared to be a consensus that subparagraph (c) should be retained in its current form, with a clarification in the Guide.

36. Mr. HOWLAND (United Kingdom) said there was no point in including in the Guide a clarification embodying a suggestion made by his delegation if that suggestion were not to be reflected in the article. While he would prefer to see an unambiguous statement in the text of the definition, if the rationale for the change was not accepted there was no point in including a contradictory statement in the Guide.

37. Mr. SORIEUL (International Trade Law Branch) said it might be useful to discuss the United Kingdom proposal further. It would certainly be inappropriate to resolve the difficulty in the text by a formulation in the Guide that effectively contradicted the text.

38. Mr. Won-Kyong KIM (Observer for the Republic of Korea) said further consideration should be given to the proposals made by the United Kingdom, Japan and the United States.

39. Mr. PHUA (Singapore) said the Working Group had concluded that the word "stored" should be retained so as not to give the impression that the Model Law was concerned only with the generation and communication of data messages.

40. Mr. SORIEUL (International Trade Law Branch) said the concern had been to ensure that the Model Law covered both situations where data messages were transmitted and situations where they were archived but not transmitted. The concept was not necessarily linked to that of the originator of the data message, and other solutions might be possible. It would clearly be strange if a person who merely stored a message were subsumed under the definition of originator. In any event the text before the Commission represented the Working Group's solution.

41. Ms. REMSU (Observer for Canada) said she agreed that the concern was to ensure that the Model Law accommodated records that were not communicated as well as those that were. Deletion of the word "stored" would raise the question whether data messages not transmitted were in fact covered. The United Kingdom proposal rightly placed the emphasis on the generation of the data message, which was the main activity of the originator. The Commission might wish to pursue that proposal further.

42. Mr. HOWLAND (United Kingdom) pointed out that his delegation had not proposed that the word "stored" should be deleted, since storage was an important aspect of the activities being referred to. The problem was that the definition, as currently drafted, included recipients who stored the messages they received; his delegation's proposal was intended to correct that error.

43. Mr. LLOYD (Australia) said the United Kingdom proposal would make subparagraph (c) consistent with the rest of the text. The words "the originator" in articles 11 to 14 implied that each data message had only one originator. However, subparagraph (c) currently implied that a data message could have multiple originators, since a message could be generated, stored and communicated by different people. The advantage of the United Kingdom proposal was that it defined the originator as the person who generated the message.

44. Mr. CHOUKRI (Observer for Morocco) said he disagreed with the United States proposal to replace "originator" by "signer" in article 6, because the Model Law did not define the term "signer". That could lead to confusion; for example, article 2, subparagraph (c) specified that the definition of "originator" excluded intermediaries, but it was not clear whether a "signer" could be an intermediary. He also disagreed with the proposal to delete the word "stored" from subparagraph (c), because the Model Law itself referred to situations where originators stored messages; for example, article 12 dealt with the interval between the sending of a message and the acknowledgement of receipt, during which the originator presumably stored the message.

45. Ms. BOSS (United States of America) said she understood the concern of the observer for Morocco about the use of a new term, and agreed to leave article 6 unchanged for the time being. With respect to article 2, subparagraph (c), she was willing to retain the word "stored" as long as emphasis was placed on the idea of communication, which was the subject of chapter III of the Model Law. The problem with the United Kingdom proposal was that it focused on the generation of a data message and made communication seem irrelevant, whereas all of the articles in chapter III concerned the sending and receiving of data messages.

46. Mr. TELL (France) said he shared the United States delegation's views on the United Kingdom proposal; the latter appeared to dissociate the generation of a data message from its storage or communication, thereby implying that a message could have more than one originator. He wondered whether the current text already addressed the concern expressed by the observer for Canada about ensuring that the Model Law covered the storage of data messages.

47. Mr. MASUD (Observer for Pakistan) said he agreed with the United States delegation that the United Kingdom proposal failed to emphasize the idea of

communication. Moreover, he did not agree that the words following "communicated" in subparagraph (c) should be deleted, since that change was unrelated to the rest of the United Kingdom proposal, and it was important to specify that an intermediary could not be considered an originator.

48. Mr. SORIEUL (International Trade Law Branch) said the Commission had identified a flaw in the text of subparagraph (c) which the Working Group had been unable to correct. He suggested that since no consensus had been reached, the Commission should adopt the subparagraph as currently drafted and decide how that flaw should be dealt with in the Guide.

49. Mr. MADRID (Spain) said that if the generator and the originator of a data message were considered to be one and the same, the problem noted by the United States was only theoretical. If it was assumed that the communicator of a message was either the generator - in which case no problem arose - or a third party who sent the message on behalf of the generator, so that the originator was not the sender but the person on whose behalf the message was sent, then the United Kingdom proposal was an acceptable solution that deviated only slightly from the current text.

50. Ms. BOSS (United States of America) suggested that the United Kingdom proposal should be amended so that subparagraph (c) would end with the words "and communicated prior to storage". That would solve the problem posed by the reference to storage, while still ensuring that the Model Law covered stored data messages; it also preserved the idea that communication was a key component of the definition of an originator. Because no formulation could cover all possible situations, the Guide should give specific examples of how the definition of "originator" applied in each case.

51. Mr. PHUA (Singapore) said he supported the United States proposal.

52. Mr. ALLEN (United Kingdom) said the United States proposal only covered cases where data messages were both generated and communicated, and failed to address the concern of the observer for Canada about messages that were generated and stored, but not communicated. Conversely, it also failed to cover cases where messages were communicated but not stored. The real issue to be decided was whether the originator of a message that was communicated was the generator or the communicator, in cases where the two were not one and the same.

53. The CHAIRMAN suggested that the word "and" in the United States proposal should be changed to "or".

54. Mr. ALLEN (United Kingdom) said the subparagraph would still imply that messages were always stored after being communicated. However, the word "or" would be preferable to "and".

55. Ms. BOSS (United States of America) said the difficulty would be eliminated if the wording was changed to "prior to any storage". She agreed with the United Kingdom on the substantive point at issue, and felt that chapter III of the Model Law, which dealt with communication, assumed that the communicator, and not the generator, was the originator of a data message. Another possible

solution was to exclude the idea of generation from the definition of "originator", since it was unnecessary for the purposes of chapter III.

ELECTION OF OFFICERS (continued)

56. Mr. BURMAN (United States of America) nominated Mr. Illescas (Spain) for the office of Rapporteur.

57. Mr. Illescas (Spain) was elected Rapporteur by acclamation.

The meeting rose at 1.05 p.m.